

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTIAN ALONZO GIRON-CASTRO,

Petitioner,

V.

NATALIE ASHER, et al.,

Respondents.

CASE NO. C14-0867JLR

ORDER ADOPTING REPORT AND RECOMMENDATIONS

This matter comes before the court on the Report and Recommendation of United States Magistrate Judge James P. Donohue (R&R (Dkt. # 17)) and Respondents' objections thereto (Objections (Dkt. # 18); Errata re Objections (Dkt. # 19)¹). Having carefully reviewed the foregoing, the balance of the record, and the governing law, the

¹ The mistake corrected in Respondents' errata re objections (Dkt. # 19) pertains to the date of the Report and Recommendation and is immaterial to the substance of this order (*id.* at 1); therefore, when referring to Respondents' objections to the Report and Recommendation, the court will cite to the original objections (Dkt. # 18), not the corrected objections in the errata (Dkt. # 19).

1 court ADOPTS the Report and Recommendation (Dkt. # 17) and therefore GRANTS in
2 part and DENIES in part Petitioner's habeas petition (Dkt. # 1), DENIES as moot
3 Petitioner's motion for a preliminary injunction (Dkt. # 4), and ORDERS the Executive
4 Office of Immigration Review to provide Petitioner with an individualized bond hearing
5 within 14 days of the date of this order.

6 **I. BACKGROUND**

7 Petitioner Christian Giron-Castro is a citizen of El Salvador who has been detained
8 by U.S. Immigration and Customs Enforcement ("ICE") at the Northwest Detention
9 Center since June 19, 2013, under a reinstated order of removal. (R&R at 1.) Mr. Giron-
10 Castro applied for withholding of removal (*id.* at 2), but an immigration judge ("IJ")
11 denied his application. (*Id.*) His appeal to the Board of Immigration Appeals is pending.
12 (*Id.*) During his detention, Mr. Giron-Castro has requested release on bond, but ICE has
13 denied his requests, and an IJ found no jurisdiction to hold a bond hearing. As a result,
14 Mr. Giron-Castro brought the habeas petition at issue here seeking release from detention
15 or a bond hearing (*id.* at 2-3) on the ground that his prolonged detention without a bond
16 hearing violates due process and 8 U.S.C. § 1226(a). (Pet. (Dkt. # 1) at 10-13.) Mr.
17 Giron-Castro also filed a motion for a preliminary injunction, again seeking a bond
18 hearing. (*See generally* Mot. (Dkt. # 4).)

19 Magistrate Judge Donohue recommended granting the petition in part and denying
20 it in part. (R&R at 16.) Specifically, Magistrate Judge Donohue recommended denying
21 Mr. Giron-Castro's request for an order of release but granting his request for an
22 individualized bond hearing. (*Id.*) In light of those recommendations, Magistrate Judge

1 Donohue also recommended denying as moot Mr. Giron-Castro's motion for a
2 preliminary injunction. (*Id.* at 16-17.) Furthermore, as part of his analysis, Magistrate
3 Judge Donohue concluded that Mr. Giron-Castro is being detained under 8 U.S.C.
4 § 1231(a) rather than § 1225(b) or § 1226(a). (*Id.* at 7-10.) Respondents filed timely
5 objections to the Report and Recommendation. (*See generally* Objections.)

6 **II. STANDARD OF REVIEW**

7 A district court has jurisdiction to review a magistrate judge's report and
8 recommendation on dispositive matters. Fed. R. Civ. P. 72(b)(3). "The district judge
9 must determine de novo any part of the magistrate judge's disposition that has been
10 properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole
11 or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C.
12 § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3) ("The district judge may accept, reject,
13 modify the recommended disposition; receive further evidence; or return the matter to the
14 magistrate judge with instructions."). "The statute makes clear that the district judge
15 must review the magistrate judge's findings and recommendations de novo if objection is
16 made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.
17 2003) (en banc).

18 **III. DISCUSSION**

19 Respondents object to only one of Magistrate Judge Donohue's
20 recommendations—namely, that Mr. Giron-Castro is entitled to an individualized bond
21 hearing under *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) ("*Diouf II*").
22 (Objections at 2.) The court, however, has thoroughly examined the record before it and

1 the relevant law, and finds Magistrate Judge Donohue's reasoning persuasive. Moreover,
 2 the objections raise essentially the same arguments regarding the applicability of *Diouff II*
 3 to this case that Respondents submitted to Magistrate Judge Donohue. (*Compare*
 4 Objections at 2-7 *with* Responsive Brief (Dkt. # 11) at 9-11.) As such, the court
 5 independently rejects those arguments for the same reasons articulated in the Report and
 6 Recommendation. (*See* R&R at 13-16.)

7 Although Mr. Giron-Castro initially argued that he is being detained under 8
 8 U.S.C. § 1226(a) (*see, e.g.*, Reply to Responsive Brief (Dkt. # 14) at 2-5), none of the
 9 parties have objected to Magistrate Judge Donohue's conclusion that Mr. Giron Castro is
 10 being held under § 1231(a). (*See* Objections at 2; Resp. (Dkt. # 20) at 2.) Nevertheless,
 11 in light of the disagreement on this issue in this and other cases,² the court will address
 12 the matter.

13 First, the court agrees with Magistrate Judge Donohue's analysis of the case law
 14 cited by Mr. Giron-Castro in his reply briefs. (*See* R&R at 10-12; Reply to Resp. (Dkt. #
 15 15) at 3-4; Reply to Responsive Brief at 2-5 (citing *Nadarajah v. Gonzales*, 443 F.3d
 16 1069 (9th Cir. 2006); *Owino v. Napolitano*, 575 F.3d 952 (9th Cir. 2009); *Rodriguez v.*
 17 *Robbins*, 715 F.3d 1127 (9th Cir. 2013); and *Castillo v. ICE Field Office Dir.*, 907 F.

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 19 ² For example, Magistrate Judge Donohue alone has handled two other recent habeas
 20 cases that raise the same issue—that is, which statute authorizes the detention of an alien subject
 21 to a reinstated order of removal when withholding-only proceedings are still pending. Judge
 22 Coughenour has already ruled on one of those cases and disagreed with Magistrate Judge
 Donohue, concluding that § 1226(a) is the authorizing statute. *See Martinez Mendoza v. Asher*,
 C14-0811JCC, Dkt. # 14 (W.D. Wash. Sept. 16, 2014). In the second case, Magistrate Judge
 Donohue's Report and Recommendation remains pending before Judge Lasnik. *See Cerna-*
Anaya v. Asher, C14-0807RSL (W.D. Wash. 2014).

1 Supp. 2d 1235 (W.D. Wash. 2012)).) Those cases are inapplicable to the facts of this
2 case because, as Magistrate Judge Donohue points out, none of them dealt squarely with
3 the issue of the administrative finality of a reinstated order of removal. (See R&R at 10-
4 12.)

5 Second, the court concurs in Magistrate Judge Donohue's interpretation of *Ortiz-*
6 *Alfaro v. Holder*, 694 F.3d 955 (9th Cir. 2012). (See R&R at 7 n.3.) In that case, the
7 Ninth Circuit was concerned with finality for the purposes of judicial review, not
8 administrative finality under 8 U.S.C. § 1231. See *Ortiz-Alfaro*, 694 F.3d at 957-58.
9 Moreover, the concern for preserving the right to appeal that animated the court of
10 appeals' analysis in that case is inapplicable in the factual and procedural context of this
11 matter. See *id.* at 958. Whether Mr. Giron-Castro is being detained under § 1231(a) as
12 opposed to § 1226(a) has no effect on his right to seek judicial review of his reinstated
13 order of removal, see 8 U.S.C. § 1231(a)(5), or the ultimate decision on his application
14 for withholding of removal. See *Ortiz-Alfaro*, 694 F.3d at 958.

15 Finally, the court notes that several courts in other districts have reached the
16 contrary conclusion on this issue. See *Uttecht v. Napolitano*, No. 8:12CV347, 2012 WL
17 5386618 (D. Neb. Nov. 1, 2012); *Pierre v. Sabol*, Civil No. 1:11-CV-2184, 2012 WL
18 1658293 (M.D. Pa. May 11, 2012). Like Magistrate Judge Donohue, however, the court
19 finds the reasoning of those cases unpersuasive. In each instance, the opinion provides
20 little analysis of whether reinstated orders of removal are administratively final while
21 withholding-only proceedings are pending. Instead, both opinions simply conclude that
22 because some sort of proceeding is ongoing, the reinstated removal order cannot be

1 administratively final. *See Uttecht*, 2012 WL 5386618, at *2; *Pierre*, 2012 WL 1658293,
2 at *4. Importantly, in reaching that conclusion, neither opinion wrestles with the clear
3 language of § 1231(a)(5) barring any reopening of or challenge to a reinstated removal
4 order. 8 U.S.C. § 1231(a)(5). This court finds § 1231(a)(5) decisive on this issue.
5 Accordingly, Mr. Giron-Castro's detention is authorized by § 1231(a).

6 **IV. CONCLUSION**

7 For the foregoing reasons, the court hereby ORDERS as follows:

8 (1) The court ADOPTS the Report and Recommendation (Dkt. # 17) in its
9 entirety.
10 (2) The court GRANTS in part and DENIES in part Mr. Giron-Castro's habeas
11 petition (Dkt. # 1). Mr. Giron-Castro is not entitled to an order of release, but
12 he is entitled to an individualized bond hearing before an immigration judge.

13 Accordingly, the court ORDERS the Executive Office of Immigration Review
14 to provide Mr. Giron-Castro with such a bond hearing within 14 days of this
15 order.

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1 (3) The court DENIES as moot Mr. Giron-Castro's motion for a preliminary
2 injunction (Dkt. # 4).

3 (4) The Clerk shall send a copy of this Order to the parties and to Judge Donohue.

4 Dated this 2nd day of October, 2014.

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8 JAMES L. ROBART
9 United States District Judge

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